Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

KEITH J. KANOUSE, SR.,

Petitioner,

vs.

GUNSTER, YOAKLEY & STEWART, P.A.,
a Florida professional association,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MARSHALL J. OSOFSKY
Counsel of Record
LEWIS, VEGOSEN & ROSENBACH, P.A.
500 S. Australian Ave., 10th Flr.
West Palm Beach, Florida 33401
(407) 659-3300

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Can an employer knowing that an employee is about to file bankruptcy or is insolvent discriminate against that employee before the employee actually files for bankruptcy protection? (Compare the Eleventh Circuit in *Kanouse v. Gunster, Yoakley & Stewart, P.A.*, (where employer could discriminate) with *In re: Tinker*, 99 B.R. 957 (Bankr. W.D. Mo. 1989) (where employer could not discriminate if imminent bankruptcy or insolvency was *sole* reason for termination))

LIST OF ALL PARTIES TO THE PROCEEDINGS

Keith J. Kanouse, Sr.

Gunster, Yoakley & Stewart, P.A., a Florida Professional Association

RULE 29.1 LISTING

There is no parent or subsidiary company to either Petitioner or Respondent.

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OPINIONS BELOW

Kanouse v. Gunster, Yoakley & Stewart, P.A. (*In re: Kanouse*), No. 94-4733 (11th Cir. filed April 25, 1995), reproduced herein as Appendix A; *Kanouse v. Gunster, Yoakley & Stewart, P.A.* (*In re: Kanouse*), 168 B.R. 441 (S.D.Fla. 1994), reproduced herein as Appendix B; and *Kanouse v. Gunster, Yoakley & Stewart, P.A.* (*In re: Kanouse*), 153 B.R. 81 (Bankr. S.D.Fla. 1993), reproduced herein as Appendix C.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on April 25, 1995. (App. A) This Court has jurisdiction to issue the requested Writ of Certiorari under 28 U.S.C. § 1254(1).

Subject matter jurisdiction in the District Court was pursuant to 28 U.S.C. § 158(a). The appeal to the United States District Court, Southern District of Florida arose out of a Final Judgment entered by the Bankruptcy Court of the Southern District of Florida in favor of Respondent, Gunster, Yoakley & Stewart, P.A. and against Petitioner, Keith J. Kanouse, Sr.

FEDERAL STATUTE PROVISION INVOLVED

11 U.S.C., § 525(b) provides:

> (b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt –
>
> > 1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;
> >
> > 2) has been insolvent before the commencement of a case under this title or during the case, but before the grant or denial of a discharge; or,

3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

STATEMENT OF THE CASE

A. Factual Background[1]

From September 15, 1983 through November 1, 1990, Petitioner, KEITH J. KANOUSE, SR. ("KANOUSE"), was a shareholder, officer, director, and employee of a Florida law firm, GUNSTER, YOAKLEY & STEWART, P.A. ("GUNSTER") and the partner in charge of the firm's franchise law department. While employed at GUNSTER, KANOUSE became embattled in his own extensive divorce litigation and appeal which spanned five (5) years during which time KANOUSE was required to pay attorneys' fees, court costs, expert witness fees, medical fees, as well as approximately $54,000 for his wife's trial attorneys' fees and costs and, in addition, ordered to pay approximately $33,000 in appellate attorneys' fees for his former wife. KANOUSE was further ordered to make substantial monthly alimony and child support payments. As a result of the divorce litigation, it became necessary for KANOUSE to incur approximately $200,000 in unsecured liabilities by borrowing from several financial institutions, including a $50,000 unsecured line of credit from Southeast Bank, a client of GUNSTER, on July 20, 1988.

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[1] In light of the procedural posture of the case below, the facts are accepted as true for purposes of the summary judgment granted in favor of GUNSTER.

In March, 1990, after unsuccessful attempts to reduce the alimony and child support obligations due to a reduction in income, coupled with the fact that the Southeast Bank unsecured line of credit had become due with approximately $41,750 owing, KANOUSE informed GUNSTER'S Management Committee of his financial predicament. The Management Committee then appointed Paul W. Courtnell ("Courtnell"), a GUNSTER attorney, to act as attorney for KANOUSE in an attempt to work out a payment arrangement with the unsecured creditors.

A proposal involving the payment of approximately 52% was made to the unsecured creditors, with the source of the funds coming from KANOUSE's exempt assets, including his profit sharing, target benefit plan, 401-K plan, and IRA. The proposal was rejected by the unsecured creditors including KANOUSE's wife's former appellate attorneys, Klein & Walsh, P.A., who had commenced garnishment proceedings on KANOUSE's salary and on the interest he was receiving from an investment program which involved other partners of GUNSTER.

Klein & Walsh, P.A. imposed a deadline of September 22, 1990 to accept a counter-proposal which included being paid $20,000 immediately, and $10,000 over a year, with GUNSTER guaranteeing the $10,000 to be paid from KANOUSE's salary and/or bonuses as long as he was employed at GUNSTER. GUNSTER was to further guarantee that if KANOUSE was no longer in its employ, GUNSTER would pay the remaining sums due. Courtnell recommended KANOUSE accept the proposal by Klein & Walsh, P.A., despite the fact that it exceeded the 52% proposal made to all his other unsecured creditors.

KANOUSE could not enter into the agreement with Klein & Walsh, P.A., as it would have destroyed any chance he had to enter into a viable workout agreement with all his other unsecured creditors as the creditors would not be treated equally and fairly. Further, KANOUSE did not have the $20,000 in cash initially required to be paid to Klein & Walsh, P.A.

KANOUSE then contacted Courtnell to advise him that he could not accept Klein & Walsh, P.A.'s counter-proposal. Courtnell responded by advising KANOUSE that he could no longer represent KANOUSE and that he would be making a recommendation to the Management Committee that KANOUSE be "kicked out of the law firm," and stated that KANOUSE's "days with the firm were numbered."

Following Courtnell's comments, KANOUSE conferred with David McIntosh ("McIntosh"), GUNSTER's Chief Executive Officer. Upon relating his conversation with Courtnell to McIntosh, McIntosh stated that, in his opinion, the issue of expulsion because of KANOUSE's financial condition was a legitimate item of consideration for the Management Committee.

A meeting was then held with KANOUSE, Courtnell and McIntosh where, once again, attempt was made to formulate a plan to resolve KANOUSE's financial problems with his unsecured creditors. Courtnell and McIntosh presented a proposal to KANOUSE that included the depletion of KANOUSE's retirement funds to pay creditors. However, a balance of 48% would remain due to unsecured creditors, resulting in monthly payments which would be impossible for KANOUSE to make.

Despite the futility of KANOUSE trying to survive under this arrangement, Courtnell and McIntosh were insistent that KANOUSE accept this course of action.

On the last Sunday in September, 1990, the Management Committee conducted an unscheduled meeting in which Courtnell made a report which included KANOUSE's financial condition which demonstrated KANOUSE's insolvency, the status of negotiations with his creditors, and the fact that KANOUSE had retained bankruptcy counsel. The following week, KANOUSE was requested to appear before the Management Committee where all three members of the Management Committee along with Courtnell indicated that if KANOUSE filed bankruptcy, the Management Committee would immediately call an emergency meeting of the shareholders to have KANOUSE expelled from the firm.

Following the Management Committee meeting, a personal and confidential memorandum was prepared discussing KANOUSE's proposed bankruptcy and explained the Committee's recommendation that KANOUSE be dissociated from the firm should he declare bankruptcy. GUNSTER then undertook a series of other actions against KANOUSE including tabling KANOUSE's request to join the International Franchise Association (the preeminent association of franchise companies, and which membership was crucial to KANOUSE's practice as head of GUNSTER's franchise practice group); denying KANOUSE's request to send his associate to an American Bar Association Annual Forum on Franchising, with GUNSTER sending instead another Corporate and Securities Department partner with no franchise experience;

attempting to have the Corporate and Securities Department develop a parallel franchise practice; terminating the firm's attorney/client relationship with KANOUSE's largest franchise client over a fee dispute caused by GUNSTER's litigation department without consulting KANOUSE; and, omitting to include information concerning GUNSTER's franchise practice group and KANOUSE's photograph from the firm's new brochure.

GUNSTER's actions amounted to a constructive expulsion of KANOUSE which resulted in KANOUSE tendering his forced resignation in November, 1990. The constructive expulsion by GUNSTER took place with GUNSTER's full knowledge of KANOUSE's financial condition, his intent to file for bankruptcy protection, the retaining of bankruptcy counsel and KANOUSE's insolvency. On May 31, 1991, KANOUSE filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in the United States District Court, Southern District of Florida.

B. Proceedings Below.

During the course of the Chapter 11 proceeding, KANOUSE filed an adversary pleading against GUNSTER for employment discrimination, alleging GUNSTER violated 11 U.S.C. § 525(b), which prohibits a private employer from discriminating against debtors because of a debtor/employee's insolvency, bankruptcy or non-payment of a dischargeable debt. GUNSTER filed an Answer and a Motion for Summary Judgment which was argued before the Honorable Judge Robert A. Mark of the Bankruptcy Court on February 23, 1993.

At the hearing on the Motion for Summary Judgment, the Court entertained argument on one issue only: whether KANOUSE could make a claim under 11 U.S.C. § 525(b) as he was not a debtor at the time of his constructive expulsion which preceded the filing of bankruptcy by approximately seven (7) months. The Court found that the applicable statute required an analysis based upon the plain meaning doctrine and ruled that Summary Judgment would be granted based upon a lack of standing under § 525(b). The court found that § 525(b) prohibited employment discrimination only against a bankruptcy debtor, and since KANOUSE was not a debtor at the time of the alleged prohibited discrimination, the Court found the statute was inapplicable. The Court did not consider any other issues raised in the Motion for Summary Judgment. (App. C)

KANOUSE filed a Notice of Appeal with the United States District Court, Southern District of Florida. On June 8, 1994, the District Court entered an order affirming the Bankruptcy Court's memorandum order. (App. B)

Following the affirming of the Bankruptcy Court's order by the District Court, KANOUSE filed his Notice of Appeal to the Eleventh Circuit. The Eleventh Circuit affirmed and incorporated by reference the judgment of the District Court for the reasons set forth in the memorandum opinion of the Bankruptcy Court. (App. A)

REASONS FOR GRANTING THE WRIT

This Court should resolve the conflict which now exists between the courts regarding whether employers

may discriminate against employees by terminating employees who are insolvent or on their way to the Bankruptcy Court to file their bankruptcy petitions.

The Eleventh Circuit, by rejecting the well-reasoned rationale of *In Re: Tinker*, 99 B.R. 957 (Bankr. W.D. Mo. 1989), has now created a race to the courthouse scenario which flies in the face of the fresh start policies espoused by the United States Supreme Court in *Perez v. Campbell*, 402 U.S. 637 (1971).

The issue is clearly presented because of the procedural posture of the case. For the purpose of the narrow issue before the courts of whether Petitioner had standing to assert the protections of § 525(b), the assumptions were that the Petitioner had been terminated solely due to his insolvency and because his employer knew that he was going to file for bankruptcy protection.[2] In spite of these facts, the Eleventh Circuit has created a conflict among courts involving an employer's right to discriminate against an employee under the Bankruptcy Code. Had KANOUSE not filed bankruptcy and attempted to sue Respondent in a forum other than the Bankruptcy Court, KANOUSE would not have standing to assert a claim under § 525(b). The impact on employment and labor law is great and seriously affects the growing area of discrimination litigation.

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[2] Although these were issues which were to be later litigated, for purposes of determining whether the Petitioner had standing, they were deemed true.

I.

THE ELEVENTH CIRCUIT VIOLATED THE *PEREZ* DOCTRINE BY AFFIRMING THAT THE PETITIONER HAD NO STANDING TO ASSERT THE PROTECTIONS OF § 525(b).

The Eleventh Circuit in affirming the District Court opinion has now established as precedent that an employer can terminate an employee because of an imminent bankruptcy filing, the employee's insolvency or the employee's failure to pay a dischargeable debt as long as the employer wins the race to the courthouse by terminating the employee prior in time to the employee's filing for bankruptcy protection. In doing so, the Eleventh Circuit has dismissed without any reconciliation the deeply rooted principle of the Bankruptcy Code to "give debtors a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Perez v. Campbell*, 402 U.S. 637 (1971).

In *Perez*, this Court restricted the discrimination that is to be practiced by public entities against discharged debtors. Congress codified *Perez* in the Bankruptcy Reform Act of 1978 through the passage of 11 U.S.C. § 525(a). Thereafter, under the Bankruptcy Amendments and Federal Judgeship Act of 1984, § 525(b) was added to the Bankruptcy Code in response to a series of cases testing whether the same principle should be applied to prevent private employer discrimination against individuals.

In determining the meaning of a statute, a court should not only look to the particular statutory language,

but to the design of the statute as a whole and to its object and policy. *Crandon v. United States*, 110 S. Ct. 997, 1001 (1990). The Eleventh Circuit ignored the policies of the Bankruptcy Code and violated the fresh start policies of *Perez* by narrowly construing the statute to deny Petitioner and any employee who is insolvent or fails to pay a dischargeable debt the protections afforded by § 525(b).

A. The Eleventh Circuit failed to apply the plain meaning doctrine in that it failed to review § 525(b) *in pari materia*.

Under the wording of § 525(b), an insolvent individual who has not yet filed for bankruptcy protection when terminated still falls within the protection of the statute once he does file. Section 525(b) is broken up into two main parts. The introductory language of the statute constitutes the first part, followed by the annunciation of the three classes of individuals who cannot be discriminated against in the second. The introductory clause of the section provides that:

> No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt –

The second portion of the section then sets forth three classes of individuals who cannot be discriminated against, including any individual who:

> 1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

> 2) has been insolvent before the commencement of a case under this title or during the case, but before the grant or denial of a discharge; or,
>
> 3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

If possible, a statute must be construed in such a fashion that every word has some operative effect. *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011 (1992). Further, the meaning of the words depends on the context in which they are used in the statute. *Shell Oil Company v. Iowa Department of Revenue*, 488 U.S. 19, 26 (1988). As noted by the United States Supreme Court in *Shell Oil Company*, in quoting Judge Learned Hand, "words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used. . . . ". *Shell Oil Company*, 48 U.S. 19, 26, quoting *NLRB v. Federbush Company*, 121 F.2d 954, 957 (2d Cir. 1941). "A statute should be construed so that effect is given to all its provisions, so that no part of it will be inoperative or superfluous, void or insignificant." *James Cable*, 27 F.3d 534, 536, *quoting Gonzalez v. McNary*, 980 F.2d 1418, 1420 (11th Cir. 1993). See also, *In Re: General Development Corporation*, 135 B.R. 1015, 1017 (Bankr. S.D. Fla. 1991) (Courts must avoid interpreting a statute in a way which would render any part of the statute superfluous, erroneous or fails to give effect to the words chosen by Congress).

In reading the two portions of § 525(b) together, the first portion of § 525(b) limits the section's scope to affect only those individuals who are presently a debtor, have been a debtor, or are associated with a debtor under the Bankruptcy Code at the time that the *claim* of discrimination is made. The second portion of § 525(b) then proceeds to define those classes that may not be discriminated against as a result of their status at the time the discrimination occurs.

Any other reading of the statute would render § 525(b) meaningless. Under the courts' interpretation of the statute, especially with regard to § 525(b)(2), the statute would provide protection to a debtor who was fired *after* he filed for bankruptcy protection solely because he was insolvent before he filed, but not provide protection to a debtor who was fired *before* he filed for bankruptcy protection solely because he was insolvent before he filed.

The interpretation of § 525(b) by the courts below is contrary to express language of the statute. Moreover, there are absolutely no viable policy reasons for offering protection to a debtor who was discriminated against solely because he was insolvent, and not offer some protection to an individual who was discriminated against before he filed due to his insolvency. Any such policy clearly violates the doctrine of *Perez*. Thus, it is clear that insolvency prior to the filing of bankruptcy must be a protected class under the statute as long as it can be shown that insolvency was the *sole* reason for the termination of the employee.

B. The Eleventh Circuit in affirming the District Court ignored applicable legislative history which would aid the Court in construction of the words used in the statute.

The plain meaning analysis employed by the courts below yields an absurd result contrary to the intent of Congress. The plain meaning of a statute is not conclusive in the rare cases where the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters. In these cases, the intention of the drafters, rather than the strict language, would control. *United States v. Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1031 (1989). Where applying the plain meaning of a statute would lead to absurd results, the court may look to legislative history in an effort to determine the intent of Congress. *United States Ex. Rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1498 (11th Cir. 1991). A court should not exclude consideration of legislative history or extra statutory materials when such would aid construction of the words used in the statute "however clear the words may appear on superficial examination." *In Re: Julien Company*, 136 B.R. 765, 770 (Bankr. Tenn. 1992) (quoting *In Re: Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989) (quoting *United States v. American Trucking Association, Inc.*, 310 U.S. 534, 553 (1940)) Further, in determining the meaning of a statute, a court should not only look to the particular statutory language, but to the design of the statute as a whole and to its object and policy. *Crandon*, 110 S. Ct. 997, 1001.

Clearly the policy behind 11 U.S.C. § 525 is to protect against discrimination by both governmental entities and

private employers in circumstances where an employee has become insolvent or has had to file for bankruptcy protection. This is especially true as in the subject action when it is uncontroverted for purposes of this appeal that GUNSTER constructively terminated KANOUSE solely for the reasons of his insolvency and his intent to file for bankruptcy protection. GUNSTER should not be allowed to discriminate against KANOUSE merely due to the timing of the filing of the bankruptcy petition when at all times it had the requisite *"mens rea"* to fire him based upon his financial condition. The narrow reading of the statute by the courts below clearly violates the principles behind the fresh start policies of *Perez*.

The present version of § 525(b) enacted in 1984 was originally proposed in a 1983 Senate Omnibus Bill. Although there is no legislative history accompanying the 1984 Amendment, the 1983 Senate Omnibus Bill clearly reflects that it was to be applied to individuals who would become debtors in bankruptcy. The 1983 Senate Omnibus Bill (S. 445, Report No. 98-65) was a bill introduced to amend Title 11 § 525 of the code. The 1983 bill stated:

> (b) no private employer may terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or any person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or under the Bankruptcy Act, or has been insolvent before the commencement of a case under this title or during the case, but before the grant or

> denial of a discharge; or, who has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

The legislative history as cited within the report accompanying the Omnibus Bankruptcy Improvement Act of 1983 stated:

> [t]his section amends section 525 of title 11 to extend the protections against discrimination to persons employed in the private sector. Under this section, no private employer may terminate employment of or discriminate with respect to employment against any person on the basis that that person has been *or will be* a debtor in bankruptcy, or has suffered insolvency pending a discharge.

Omnibus Bankruptcy Improvements Act of 1983, Sec. 352 (April 26, 1983). (Emphasis added).

The 1983 bill which was not enacted is *substantively identical* to the 1984 amendment[3] passed by Congress

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[3] 11 U.S.C. § 525(b) provides:

(b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt –

1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

2) has been insolvent before the commencement of a case under this title or during the case, but before the grant or denial of a discharge; or,

without legislative comment. The legislative comment to the 1983 bill clearly reflects the intent to protect individuals who would be filing bankruptcy as well as to those who had filed bankruptcy protection. Although the Bankruptcy Court did not have the 1983 bill in front of it at the time the motion was argued below, the court raised the issue in making its ruling stating:

> Mr. Hackleman pointed out that the Senate report was to the Omnibus Bankruptcy Improvements Act of 1983 which was a forerunner to the Bankruptcy Amendments Act of 1984 and that omnibus bill may or may not have had language consistent with the Legislative statement of saying that it is intended to protect persons who "will be a debtor". Maybe that was in the 1983 bill, we don't know because that is not before the Court, but this is not a clear statement of Legislative History accompanying the 1984 Act even if we were to look to the Legislative History.

As the bills are identical, and the legislative history was not amended, the same legislative intent should be applied to the 1984 bill that was applied to the 1983 bill. Despite the bills being identical, both the Eleventh Circuit and District Court ignored the legislative comments to the previous bill.[4]

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3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

[4] The Bankruptcy Court did not have the benefit of reviewing the 1983 bill which was provided to the District Court and Eleventh Circuit.

II.

THE ELEVENTH CIRCUIT ERRED IN REJECTING THE RATIONALE OF *IN RE TINKER*.[5]

The *Tinker* opinion addresses the issue of whether the termination of an employee prior to the filing of a bankruptcy petition precludes the application of § 525(b). In the case of *Tinker*, the District Court was faced with an employer terminating an employee prior to her filing for bankruptcy protection. In *Tinker*, the debtor was terminated by her private employer on April 20, 1988. On April 25, 1988, the debtor, along with her husband, filed a petition under Chapter 7 of the United States Bankruptcy Code. The debtor then instituted an adversary proceeding under 11 U.S.C. § 525(b) against the former employer. The employer defended the action claiming that termination occurred five (5) days prior to the filing of the petition, and that a strict reading of § 525(b) excluded the plaintiff/debtor from a recovery because she was neither a debtor at the time of termination, nor had she been a debtor before she was terminated. *Tinker*, 99 B.R. 957, 959.

The *Tinker* court rejected the employer's argument claiming that it could not believe that it was the intent of Congress to set up a "foot race between the prospective bankrupt and his or her employer". *Tinker*, 99 B.R. 957, 960. The Court then examined Congress' intent by looking at the legislative history of the forerunner to the 1984 statute which provided:

> This section amends Section 525 of Title 11 to extend the protection against discrimination to

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[5] *In Re: Tinker*, 99 B.R. 957 (Bankr. W.D. Mo. 1989).

> persons employed in the private sector. Under this section, no private employer may terminate employment of or discriminate with respect to employment against any person on the basis that that person had been *or will be* a debtor in bankruptcy, or has suffered insolvency pending a discharge. (S.Rep. No. 98-65, 98th Cong. 1st Sess 80 (1983) (Senate Report accompanying S. 445, Omnibus Bankruptcy Improvements Act of 1983, which was a forerunner to the Bankr. Amend. of 1984). (Emphasis supplied).

The court in *Tinker* reviewed the language of the report accompanying the Omnibus Bankruptcy Improvements Act of 1983 for insight as to Congress' intent in enacting the portion of the statute forbidding discrimination against persons employed in the private sector as the 1984 bill had no applicable legislative history. To interpret the statute any other way the court found, would "be to say that if the employer can get the firing done one minute before the petition is filed there never could be a § 525(b) complaint." *Tinker*, 99 B.R. 957, 960. The court's rationale was based on the overall fresh start policy behind bankruptcy protection, as well as from reviewing the legislative intent of the forerunner to the Bankruptcy Amendments of 1984.

In rejecting the employer's argument, the *Tinker* court also found that "subsection (2) of subsection (b) of § 525, contemplates 'insolvency before the commencement of a case . . . ' as substantial proof that it is not just the filing of a Petition for Relief that triggers the protection of 11 U.S.C. § 525(b)." *Tinker*, 99 B.R. 957, 960.

The employer in *Tinker* also argued that there was no proof that the termination was *solely* because the plaintiff

filed bankruptcy, and it is on this ground that the court ruled against the debtors as it found that the prospective bankruptcy was merely a factor in the bank's decision to terminate, and that the bank had established what it regarded as legitimate reasons for the dismissal. *Id.* In the subject action, this issue was expressly not addressed by the Bankruptcy Court.

The Eleventh Circuit in affirming the lower courts' rulings attempts to distinguish *Tinker* from the subject action by claiming GUNSTER terminated KANOUSE approximately seven (7) months prior to his filing for bankruptcy protection. However, this is a distinction without a difference in light of the facts claimed to be undisputed by GUNSTER within its Motion for Summary Judgment. GUNSTER acknowledges that KANOUSE met with the three members of GUNSTER's Management Committee and it was indicated to KANOUSE that if he filed for bankruptcy, the Management Committee would immediately call an emergency meeting of the shareholders to have KANOUSE expelled. The admission by GUNSTER that if KANOUSE filed bankruptcy he would be expelled from the firm flies in the face and the spirit of § 525(b) and mitigates any time lapse that occurred between the time of termination and the time of filing of bankruptcy.

The Eleventh Circuit adopted the rationale which attempts to distinguish *Tinker* by finding that there was no race scenario in this case since KANOUSE filed his Chapter 11 petition almost seven (7) months after his resignation from the firm. There is no statutory basis for the distinction as the statute is clear on its face and does not make this distinction. Also, there is no policy reason

to make a distinction between the time periods, nor is there any authority for the proposition that seven (7) months is too much time. Logic dictates that certain individuals will take more time in putting together bankruptcy petitions than other individuals due to the complex financial position that debtors, such as KANOUSE, are in prior to filing. Without any legal basis, Eleventh Circuit and lower courts arbitrarily decided that seven (7) months was too much time.

Notwithstanding the court's discussion of the race scenario, the time factor should not be an issue as to whether KANOUSE has standing to seek the protections of § 525(b) for the policy reasons set forth herein. The "race scenario" may have more bearing on whether the termination was based *solely* upon KANOUSE's insolvency or imminent filing, but again, this was not an issue that was considered by the Bankruptcy Court during the Motion for Summary Judgment.

The rationale in *Tinker* should be employed in the subject action. The facts in the subject action warrant even a more compelling reason to adopt the rationale employed by the court in *Tinker* in that GUNSTER overtly discriminated against and terminated KANOUSE solely *because* he was going to file bankruptcy, and the firm should not now be able to escape liability by virtue of the timing of the petition.

Yet, despite the prudent rationale of *Tinker*, and the uncontroverted fact that GUNSTER was going to terminate KANOUSE if he filed for bankruptcy protection, (ultimately resulting in KANOUSE's forced resignation) the lower courts applied what they deemed "the plain meaning doctrine" to the statute and in contravention to

Perez determined that an individual could not seek protection under the statute if he had not yet become a debtor by virtue of filing a Bankruptcy Petition.

CONCLUSION

Petitioner respectfully requests the Court to grant the Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Repectfully submitted,

MARSHALL J. OSOFSKY
Counsel of Record
LEWIS, VEGOSEN & ROSENBACH, P.A.
500 S. Australian Ave., 10th Flr.
West Palm Beach, Florida 33401
(407) 659-3300

Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4733
Non-Argument Calendar

D. C. Docket No. 93-8317-CIV-SMA
BKCY Nos. 93-BK-00024, 91-BK-31544

IN RE: KEITH JANSON KANOUSE, SR.,

Debtor.

KEITH J. KANOUSE, SR.,

Plaintiff-Appellant,

versus

GUNSTER, YOAKLEY & STEWART, PA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(April 25, 1995)

Before TJOFLAT, Chief Judge, HATCHETT, Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

The judgment of the district court is affirmed for the reasons set forth in the Memorandum Opinion and Order

APPENDIX A

Granting Summary Judgment of the United States Bankruptcy Judge under date of April 15, 1993. This Memorandum Opinion was ratified, affirmed and approved by the district court on June 8, 1994.

AFFIRMED.

APPENDIX B

In re Keith Jason KANOUSE, Sr., Debtor.

Keith J. KANOUSE, Plaintiff/Appellant,

v.

GUNSTER, YOAKLEY & STEWART, P.A., a Florida professional association,

Defendant/Appellee.

No. 93-8317-CIV.

Bankruptcy Nos. 92-31544-BKC-RAM-A, 93-0024-BKC-RAM-A.

United States District Court,
S.D. Florida.

June 8, 1994.

John R. Sheppard, Jr. and Marshall J. Osofsky, Lewis, Vegosen & Rosenbach, P.A., West Palm Beach, FL, for plaintiff/appellant.

Robert S. Hackleman, Gunster, Yoakley & Stewart, P.A., Fort Lauderdale, FL, for defendant/appellee.

OMNIBUS ORDER (1) DENYING GUNSTER'S AMENDED PETITION TO PROTECT FINAL JUDGMENT OF FEDERAL BANKRUPTCY COURT BY ENJOINING KANOUSE FROM RELITIGATING CLAIMS IN OTHER FORUMS, (2) DENYING KANOUSE'S MOTION TO STRIKE GUNSTER'S APRIL 25, 1994 SUPPLEMENT TO GUNSTER'S AMENDED PETITION, AND (3) AFFIRMING BANKRUPTCY COURT'S MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT

APPENDIX B

ARONOVITZ, District Judge.

BEFORE THIS COURT is an appeal from a Memorandum Opinion and Order Granting Gunster, Yoakley & Stewart, P.A.'s ("Gunster") Motion for Summary Judgment entered by Judge Robert A. Mark, United States Bankruptcy Judge, on April 15, 1993, 153 B.R. 81. Also before this Court is Gunster's Amended Petition to Protect Final Judgment of Federal Bankruptcy Court by Enjoining Kanouse from Relitigating Claims in Other Forums, file dated September 13, 1993, and Kanouse's Motion to Strike Gunster's April 25, 1994 Supplement to Gunster's Amended Petition, file dated May 2, 1994.

This Court heard oral argument on the Appeal and the Amended Petition on April 6, 1994, and has carefully considered the briefs submitted on Appeal, Gunster's Amended Petition, the replies filed thereto, Gunster's Supplement to the Amended Petition, Kanouse's Motion to Strike Gunster's Supplement and Gunster's reply filed thereto, oral argument of counsel, the entire record, the applicable law and is otherwise fully advised in the premises. For the following reasons, it is ORDERED AND ADJUDGED that:

(1) Gunster's Amended Petition to Protect Final Judgment of Federal Bankruptcy Court by Enjoining Kanouse from Relitigating Claims in Other Forums is hereby DENIED;

(2) Kanouse's Motion to Strike Gunster's April 25, 1994 Supplement to Gunster's Amended Petition is hereby DENIED; and

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(3) The Bankruptcy Court's Memorandum Opinion and Order Granting Gunster's Motion for Summary Judgment is hereby RATIFIED, AFFIRMED & APPROVED in its entirety.

Factual and Procedural Background

Keith J. Kanouse, Sr. ("Kanouse") filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on May 31, 1991. A discussion of the events prior to this bankruptcy filing is necessary.

From September 15, 1983 through November 1, 1990, Kanouse was an officer, director, employee and shareholder of the law firm, Gunster, Yoakley & Stewart, P.A. ("Gunster"). While at the firm, Kanouse was involved in his own extensive divorce litigation during which time Kanouse was required to pay substantial fees and costs, as well as alimony. As a result of the divorce litigation, Kanouse incurred about $200,000 in unsecured liabilities.

An attorney at Gunster was appointed to help work out a payment arrangement with Kanouse's unsecured creditors. No payment agreement could be reached. In September 1990, the Management Committee at Gunster met to discuss Kanouse's financial condition.

Kanouse alleges that the Management Committee then met with Kanouse and advised him if he filed for bankruptcy, a meeting of shareholders would be convened to have Kanouse expelled from the firm. Kanouse alleges various actions taken by Gunster which amounted

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to constructive expulsion including: Gunster tabling Kanouse's request to join the International Franchise Association; denying Kanouse's request to send his associate to an American Bar Association annual forum on franchising; attempting to have the Corporate and Securities Department develop a parallel franchise practice; terminating the firm's attorney/client relationship with Kanouse's largest franchise client over a fee dispute case by Gunster's litigation department; and omitting to include information concerning Gunster's franchise practice group and Kanouse's photograph from the firm's brochure. Kanouse alleged that these actions by Gunster resulted in Kanouse tendering his forced resignation on November 2, 1990.

After leaving Gunster, Kanouse opened his own firm and on May 31, 1991 filed a petition under Chapter 11 of the United States Bankruptcy Code. On January 8, 1993, Kanouse filed an Adversary Complaint against Gunster in Bankruptcy Court alleging that Gunster had discriminated against and constructively discharged Kanouse in violation of the anti-employment discrimination provisions of 11 U.S.C. 525(b). The Complaint outlined those actions which amounted to constructive expulsion and alleged that Gunster discriminated against Kanouse due to his insolvency and contemplation of filing for protection under the United States Bankruptcy Code.

That same day (January 8, 1993), Kanouse filed a duplicative action against Gunster and others in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

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On January 28, 1993, Gunster answered Kanouse's Adversary Complaint in the Bankruptcy proceeding and simultaneously filed a Motion for Summary Judgment and accompanying affidavit. The issue before the Bankruptcy Court was the application of 11 U.S.C. § 525(b). Judge Mark found that Kanouse had no standing to make a claim under § 525(b) since Kanouse was not a debtor or former debtor at the time of the alleged constructive expulsion. (Kanouse filed for bankruptcy almost seven months after his alleged expulsion from the firm) Kanouse has appealed this decision.

While this Appeal was pending, Gunster filed an Amended Petition to Protect Final Judgment of Federal Bankruptcy Court by Enjoining Kanouse from Relitigating Claims in Other Forums. Gunster has requested this Court to enter a preliminary and permanent injunction enjoining Kanouse, a debtor-in-possession in a Chapter 11 reorganization proceeding pending in the United States Bankruptcy Court for the Southern District of Florida, from prosecuting claims in other forums that have arguably been resolved by virtue of the Final Summary Judgment entered by Judge Robert A. Mark on April 15, 1993 in the adversary proceeding brought by Kanouse against Gunster. As stated, Kanouse is pursuing an appeal of that Final Summary Judgment before this Court.

On April 6, 1994, this Court heard Oral Argument on the Appeal and the Amended Petition and at the close of all arguments took the matter under advisement. After

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Oral Argument and while the matter was under advisement, Gunster filed a Supplement to its Amended Petition on April 25, 1994. On May 2, 1994, Kanouse filed a Motion to Strike Gunster's Supplement to the Amended Petition.

Before addressing the Appeal, this Court will first consider Gunster's Amended Petition, and then Kanouse's Motion to Strike Gunster's Supplement.

Gunster's Amended Petition

Gunster has requested this Court to enter a preliminary and permanent injunction enjoining Kanouse from prosecuting claims in other forums that have arguably been resolved by virtue of the Bankruptcy Court's Final Summary Judgment entered on April 15, 1993.

As noted herein, Kanouse filed an adversary proceeding against Gunster on January 8, 1993 in the United States Bankruptcy Court for the Southern District of Florida. That same day, Kanouse filed a duplicative action against Gunster and others in the Circuit Court for Palm Beach County.

Gunster argues that the claims in Counts I, II, and VII (which have been referred to binding arbitration) and Count VIII of Kanouse's Second Amended State Court Complaint essentially mirror Kanouse's allegations in the

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Bankruptcy proceeding and are therefore barred by res judicata.[1]

Gunster argues that Kanouse should not be permitted to split his cause of action by filing separate complaints in two different courts. Gunster contends that this Court has authority to stay the state court proceedings in order "to protect or effectuate its [Judge Mark's] judgment" citing an exception to the Anti-Injunction Statute (28 U.S.C. § 2283).

Gunster further argues that under the All-Writs Act (28 U.S.C. § 1651) federal courts have broad injunctive powers to protect their own judgments. Gunster asserts that Kanouse should be enjoined from relitigating these claims in state court since Judge Mark essentially resolved them in his Memorandum Opinion and Order Granting Summary Judgment.

Kanouse, in turn, argues that res judicata does not apply to its state court claims and that the only issue litigated and decided by the bankruptcy court was the narrow issue of whether Kanouse was or had been a

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[1] On July 29, 1993, State Circuit Court Judge Garrison in the State proceeding called up for hearing Gunster's Motion to Compel Arbitration of Kanouse's claims set forth in Counts I, II, VII and VIII of the Amended State Court Complaint. On August 11, 1993, the State Court Granted Gunster's Motion to Compel Arbitration for Counts I, II and VII, but denied the Motion as to Count VIII. Gunster states Counts I, Ii and VII of the Amended State Court Complaint have now been referred to binding arbitration.

debtor at the time he was allegedly discriminated against under § 525(b) of the Bankruptcy Code.

Kanouse states that the Bankruptcy Court did not litigate and decide the claims in Counts III and VIII relating to pay-outs on certain investments, wrongful termination damages and subrogation of certain bonuses.

Kanouse argues that the state court claims, with the possible exception of Count VIII, do not arise under the same common nucleus of operative facts, and are therefore not barred by res judicata. Kanouse distinguishes Count VIII as a separate claim from the resolved § 525(b) claim because Count VIII relies in part on Gunster's violation of the employment agreement.

This Court has carefully considered Gunster's Amended Petition, the replies submitted thereto, oral argument by counsel, the pertinent portions of the record and applicable law. This Court and not the trial court has jurisdiction over this Amended Petition due to the fact that the trial court is deprived of jurisdiction upon the filing of the notice of appeal from a final judgment except that it may aid the appeal or correct clerical errors. *See, Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 (5th Cir.1984).

The only issue litigated and ruled on by Judge Mark was whether Kanouse was a debtor or former debtor at the time of the alleged discrimination for purposes of asserting a § 525(b) claim.

The Bankruptcy Court did not litigate Kanouse's entitlement to the following:

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(a) back pay of salary (Count I of Second Amended State Court Complaint);

(b) Kanouse's share of "Drexel Bonus" monies (Count II of Second Amended State Court Complaint);

(c) retirement benefits (Count VII of Second Amended State Court Complaint); or

(d) wrongful termination damages based upon a breach of employment contract (Count VIII of Second Amended State Court Complaint)

Because the Federal Bankruptcy Court in Granting Gunster's Motion for Summary Judgment did not decide those issues or claims set forth Kanouse's Second Amended State Court Complaint, the relitigation exception of the Anti-Injunction Statute (28 U.S.C. § 2283) does not apply. *See, Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988) (an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court).[2]

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[2] The Anti-Injunction Act generally prohibits the federal courts from interfering with proceedings in the state courts:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

Therefore, Congress has permitted injunctions in certain, specific circumstances, namely, when expressly authorized by statute, necessary to aid of the court's jurisdiction, or necessary to protect or effectuate the court's judgment. *Citing, Chick Kam*

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Similarly, Kanouse's state court claims are not barred by res judicata. The Eleventh Circuit in *Israel Discount Bank Ltd. v. Entin*, 951 F.2d 311 (11th Cir.1992) set forth the elements of res judicata:

> Res judicata bars relitigation of all matters decided in a prior proceeding. Specifically, it will bar a subsequent action if: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same. *Id.* at 314, *citing, Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir.1990); *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1550 (11th Cir.1990).

While the first three prongs are met in this case, the fourth is not. Cases involve the same cause of action for purposes of res judicata if the present case "arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action." *See, Israel Discount Bank*, 951 F.2d at 315, *citing, Citibank* 904 F.2d at 1503 (other citation omitted).

Choo, 486 U.S. at 145-146, 108 S.Ct. at 1689. Gunster argues the third exception applies in the case at bar. However, since Federal Bankruptcy Court in Granting Gunster's Motion for Summary Judgment did not decide those issues or claims set forth Kanouse's Second Amended State Court Complaint, the relitigation exception of the Anti-Injunction Statute does not apply.

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Kanouse's state court claims do not "arise out of the same nucleus of operative fact" as the bankruptcy proceeding. In particular, the complaint filed in the bankruptcy proceeding was based upon Gunster's alleged violation of 11 U.S.C. § 525(b) under the Bankruptcy Code. The Second Amended Complaint filed in state court asserts largely contractual claims for back salary, back bonuses, retirement benefits and wrongful termination damages based upon a breach of employment contract. As such, Kanouse's state court claims are not barred by res judicata. This court likewise declines to exercise its injunctive power under the All-Writs Act (28 U.S.C. § 1651) since its judgment is not threatened by state court adjudication.

For the reasons set forth herein, Gunster's Amended Petition to Protect Final Judgment of Federal Bankruptcy Court by Enjoining Kanouse from Relitigating Claims in Other Forums is hereby DENIED.

Kanouse's Motion to Strike Gunster's Supplement to Gunster's Amended Petition

After this Court heard Oral Argument on the Appeal and Amended Petition on April 6, 1994, and while the matter was taken under advisement, Gunster filed a Supplement to its Amended Petition on April 25, 1994. In this Supplement, Gunster advises that the state court entered an Order on April 7, 1994 granting Gunster's motion to dismiss certain counts (Counts III, VI and VIII) of Kanouse's Second Amended Complaint and allowing Kanouse ten (10) days leave to amend. On or about April 19,

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1994, Kanouse amended his complaint a third time. Gunster advises that Kanouse's Third Amended Complaint "does not appear materially to impact upon the resolution of the substantive issues addressed by the parties in their respective memorandum and at oral argument."

On May 2, 1994, Kanouse filed a Motion to Strike Gunster's Supplement citing Local Rule 7.1(C), *Local Rules of the United States District Court for the Southern District of Florida*, which provides that "no further or additional memoranda of law shall be filed without prior leave of Court" after the motion, opposing memorandum of law and the movant's reply thereto is served and filed.

On May 13, 1994, Gunster filed a Memorandum in Opposition to Kanouse's Motion to Strike Gunster's Supplement stating that the Supplement was filed because Gunster was compelled to notify this Court of Kanouse's Third Amended Complaint "in order to conserve judicial resources and in exercise of its obligation of candor to the tribunal."

In that Kanouse's Third Amended State Court Complaint was not before the Court for consideration as of the date of Oral Argument on April 6, 1994, this Court wants it to be perfectly clear that its ruling today Denying Gunster's Amended Petition has involved comparison only as between the Bankruptcy proceeding and those claims in Kanouse's Second Amended State Court Complaint as related to res judicata and relitigation exception analysis. This Court has not considered or compared those claims in Kanouse's Third Amended State Court Complaint. This Court otherwise finds good cause for

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Gunster's filing of its Supplement to the Amended Petition. Therefore, Kanouse's Motion to Strike Gunster's April 25, 1994 Supplement to Gunster's Amended Petition is hereby DENIED.

The Appeal

The issue on appeal is whether the Bankruptcy Court correctly concluded that Kanouse may **not** seek relief under 11 U.S.C. § 525(b) since he was not a debtor or former debtor at the time of the alleged acts of discrimination by Gunster.

In his Order granting Gunster's Motion for Summary Judgment, Judge Mark found that since Kanouse did not file for bankruptcy until almost seven months after allegedly being expelled from the firm, Kanouse was not a debtor or former debtor at the time the alleged discrimination took place. Since Kanouse was not a debtor or former debtor at the time of the discrimination, he could not utilize the protection against discrimination afforded by the statute. Judge Mark adopted a plain meaning interpretation of § 525(b).[3]

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[3] 11 U.S.C. § 525(b) provides that:

> No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt –

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The Court has carefully considered the issue on appeal and applied the appropriate standard of review. In accordance with Federal Rule of Bankruptcy Procedure 8013, the Bankruptcy Court's findings of fact will not be set aside unless clearly erroneous. *In re Chase & Sanborn Corp.*, 904 F.2d 588 (11th Cir.1990); *In re T & B General Contracting, Inc.*, 833 F.2d 1455 (11th Cir.1987). Equitable determinations by the Bankruptcy Court are subject to review under an abuse of discretion standard. *In re Red Carpet Corp. of Panama City Beach*, 902 F.2d 883 (11th Cir.1990). Conclusions of law are subject to *de novo* review. *In re Chase & Sanborn Corp.*, 904 F.2d at 593; *In re Sublett*, 895 F.2d 1381 (11th Cir.1990).

While the Bankruptcy Court's factual findings are subject to a clearly erroneous standard, that standard does not apply when determining the propriety of the Bankruptcy Judge's conclusions of law, (i.e.) determination of what law applies or determination of the ultimate legal conclusions resulting from the application of the law to the facts. Legal conclusions made by the Bankruptcy Judge may not be approved by the District Court without an independent determination. *In re Columbia*

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(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

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Data Products, Inc., 99 B.R. 682, 684 (D.Md.1989), *affirmed*, 892 F.2d 26 (4th Cir.1989); *citing*, *Hunter Sav. Ass'n v. Baggott Law Offices Co.*, 34 B.R. 368, 374 (S.D.Ohio 1983), *reversed on other grounds*, 750 F.2d 536 (6th Cir.1984); *In re Hollock*, 1 B.R. 212, 215 (Bankr.M.D.Pa.1979).

Appellant Kanouse primarily relies on *In re Tinker*, 99 B.R. 957 (Bankr.W.D.Mo.1989) and a Senate Report to an unenacted Omnibus Bankruptcy Improvements Act of 1983.

In *Tinker*, a Chapter 7 petition was filed five days after Geraldine Tinker was fired. The Court permitted Geraldine Tinker to bring a Section 525(b) claim even though she was technically not a debtor at the time of the discrimination. *Tinker* rejected a strict reading of the statute. The Court reasoned at 960 that:

> [it could not] believe that it was the intent of Congress to set up a foot race between a prospective bankrupt and his or her employer.

Tinker goes on to review and recite the legislative history to get an insight as to what Congress intended. *Tinker* recites the Senate Report to the unenacted Omnibus Bankruptcy Improvements Act of 1983 (this was the forerunner to the Bankruptcy Amendments of 1984):

> This section amends section 525 of Title 11 to the extent the protection against discrimination to persons employed in the private sector. Under this section, no private employer may terminate employment of or discriminate with respect to employment against any person on the basis that that person had been **or will be** a debtor in bankruptcy, or has suffered insolvency pending

APPENDIX B

> a discharge. *Tinker,* at 960, citing, (S.Rep. No. 98-65, 98th Cong. 1st Sess 80 (1983) (Senate Report accompanying S 445, Omnibus Bankruptcy Improvements Act of 1983).

Appellant therefore argues that "will be" debtors should also be afforded the protection under 11 U.S.C. 525(b). Based upon this Senate Report and the language of § 525(b)(2) which contemplates "insolvency before the commencement of a case . . . ", *Tinker* concluded that "it is not just the filing of the petition for relief that triggers the protection of 11 U.S.C. § 525(b)."

Appellee, in turn, agrees with the Bankruptcy Court's strict reading of the statute and rejection of the rationale in *Tinker.*

This Court agrees with the Bankruptcy Court's plain meaning interpretation and application of 11 U.S.C. § 525(b) in this case. The language of the statute is clear:

> No private employer may terminate the employment of, or discriminate with respect to employment against, an individual **who is or has been a debtor under this title** . . . solely because such debtor or bankrupt – (1) is or has been a debtor under this title . . .

Therefore, one "**who is or has been a debtor**" is afforded protection under 11 U.S.C. § 525(b). The statute does not allow a remedy to "will be" debtors. Since Kanouse was not a debtor nor had been a debtor at the time of the alleged acts of discrimination by Gunster, he is not entitled to relief under § 525(b).

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This Court agrees with Judge Mark's learned Memorandum Opinion and Order wherein he distinguished *Tinker* and *Tinker*'s reliance upon questionable legislative history at page 83:

> First, since the language of the statute is clear, it is not appropriate to consider legislative history. *See, e.g., In re Burns,* 887 F.2d 1541, 1545 (11th Cir.1989). Second, *Tinker* erroneously resorts to questionable legislative history in order to vary the unambiguous language of § 525(b). The legislative history relied upon in *Tinker* is not a report that accompanied the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), which Act included Section 525(b). Rather, *Tinker* relies upon a Senate report to the unenacted Omnibus Improvements Act of 1983, which is but one of several stillborn bills that preceded the July 10, 1984 enactment of BAFJA by both houses of Congress. Thus, even if the Court considered legislative history, the indirect legislative history cited in *Tinker* is not a conclusive expression of congressional intent sufficient to overcome the clear command of the statute itself. *In re Burns,* 887 F.2d at 1551-1552.

Tinker was also premised on avoiding a race between employer and prospective debtor. In this case, there is no race scenario since Kanouse filed his Chapter 11 petition almost seven months after his resignation from the firm.

For the reasons set forth herein, the Bankruptcy Court's Memorandum Opinion and Order Granting Gunster's Motion for Summary Judgment is hereby RATIFIED, AFFIRMED & APPROVED in its entirety.

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In summary and for the reasons set forth herein it is ORDERED AND ADJUDGED that

(1) Gunster's Amended Petition to Protect Final Judgment of Federal Bankruptcy Court by Enjoining Kanouse from Relitigating Claims in Other Forums is hereby DENIED;

(2) Kanouse's Motion to Strike Gunster's April 25, 1994 Supplement to Gunster's Amended Petition is hereby DENIED; and

(3) The Bankruptcy Court's Memorandum Opinion and Order Granting Gunster's Motion for Summary Judgment is hereby RATIFIED, AFFIRMED & APPROVED in its entirety.

DONE AND ORDERED.

APPENDIX C

In re Keith J. KANOUSE, Debtor.

Keith J. KANOUSE, Plaintiff,

v.

GUNSTER, YOAKLEY & STEWART, P.A., a Florida professional association, Defendant.

Bankruptcy No. 91-31544-RAM.
Adv. No. 93-0024-BKC-RAM-A.

United States Bankruptcy Court,
S.D. Florida.

April 15, 1993.

Robert S. Hackleman, Ft. Lauderdale, FL, for defendant.

Gary Dunkel, W. Palm Beach, FL, for plaintiff.

MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT

ROBERT A. MARK, Bankruptcy Judge.

Defendant, Gunster, Yoakley & Stewart, P.A. ("Gunster"), seeks entry of a summary judgment in this adversary proceeding brought by Plaintiff/Debtor, Keith J. Kanouse ("Kanouse") under § 525(b) of the Bankruptcy Code. Since the Court finds that plaintiff cannot state a claim under that section, summary judgment for the defendant is granted.

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BACKGROUND

On January 8, 1993, Kanouse, an attorney, filed the instant adversary proceeding to recover damages against Gunster, a law firm and his former employer. The complaint alleges that Gunster discriminated against and "constructively discharged" Kanouse in violation of the anti-employment discrimination provisions of Section 525(b) of the Bankruptcy Code. Specifically, Kanouse alleges that Gunster discriminated against him due to his insolvency and his contemplation of commencing a bankruptcy case to discharge his unsecured obligations to various creditors, including one of Gunster's major banking clients. Kanouse left Gunster on November 2, 1990. All of the complained of acts of discrimination occurred seven months or more before Kanouse became a debtor by filing a petition for relief under Chapter 11 of the Bankruptcy Code on May 21, 1991.

On January 28, 1993, Gunster filed an answer to the complaint and simultaneously moved for summary judgment. Among other grounds, Gunster argues that Kanouse was not eligible to bring a constructive discharge claim under Section 525(b) because he was not a "debtor" at the time of the termination of his employment with Gunster. As discussed below, the Court agrees and therefore grants Gunster's summary judgment motion.

ANALYSIS

Section 525(b) provides a remedy to *"an individual who is or has been a debtor* under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual

associated with such debtor or bankrupt . . . " 11 U.S.C. Section 525(b) (emphasis added). Section 525(b) bars employment termination or discrimination by a private employer against a debtor or former debtor solely because such debtor: (1) is or has been a debtor under the Bankruptcy Code; (2) has been insolvent before the commencement of a case under the Bankruptcy Code; or (3) has failed to pay a dischargeable or discharged debt.

The question before the Court is simple – may Kanouse seek relief under § 525(b) for alleged misconduct which occurred seven months prior to the filing of his petition. Given the plain, unambiguous language of the statute and the Supreme Court's mandate to derive meaning wherever possible, solely from the words of a statute, the result is clear. Section 525(b) provides no remedy for Kanouse.

In recent years, the Supreme Court has consistently[1] employed the plain meaning doctrine in interpreting sections of the Bankruptcy Code. In *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d

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[1] The Supreme Court's decision in *Dewsnup v. Timm*, ___ U.S. ___, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992) is a notable exception. Over Justice Scalia's strong dissent, the Court reviewed legislative history to derive its interpretation of "allowed secured claim" in Section 506(d). The Court returned to the plain view doctrine in the next bankruptcy case it decided *Patterson v. Shumate*, ___ U.S. ___, 112 S.Ct. 2242, 119 L.Ed2d 519 (1992). For the strongest statements in support of the doctrine, read Justice Scalia's dissent in *Dewsnup* and his concurring opinion in *Patterson v. Shumate*, ___ U.S. at ___, 112 S.Ct. at 2250-2251.

290 (1989), the Court held that the Bankruptcy Code should be construed in accordance with the meaning of its plain language, except in the rare cases in which a literal application would present a result demonstrably at odds with the intentions of its drafters. In the aftermath of *Ron Pair,* courts, including the Supreme Court, have repeatedly given effect to a plain language interpretation of the Bankruptcy Code. *See e.g., Patterson v. Shumate,* ___ U.S. ___, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992) (plain language of Bankruptcy Code § 541(c)(2) establishes that anti-alienation provisions in a qualified ERISA plan constitute a restriction on transfer enforceable under "applicable nonbankruptcy law"); *Union Bank v. Wolas,* ___ U.S. ___, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991) (plain language of § 547(c)(2) does not exclude long-term debt from ordinary course defense to preference liability); *Toibb v. Radloff,* ___ U.S. ___, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991) (plain language of § 109 does not exclude individual debtors from seeking relief under Chapter 11); *In re Burns,* 887 F.2d 1541 (11th Cir.1989); *In re Ferguson,* 134 B.R. 689 (Bankr.S.D.Fla.1991)[2]; *In re Suarez,* 127 B.R. 73 (Bankr.S.D.Fla.1991).

This Court finds the language of Section 525(b) to be plain and unambiguous on its face. Section 525(b) prohibits a private employer from discriminating with respect to employment against "an individual who is or

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[2] In *Ferguson,* this Court issued an en banc opinion giving plain meaning to § 1322(a)(2) of the Bankruptcy Code, relying in part on the Supreme Court's decisions applying the plain meaning doctrine and negative inference rule.

has been a debtor." Kanouse does not fall within the class of persons protected by the statute. Kanouse was neither a debtor nor former debtor at the time of the alleged acts of discrimination or at the time of the termination of his employment. *See Laracuente v. Chase Manhattan Bank*, 891 F.2d 17 (1st Cir.1989) (interpreting the language of Section 525(b) narrowly in accordance with its plain meaning).

Kanouse seeks a broader, more flexible interpretation of Section 525(b). He argues that Section 525(b) should be expansively construed to provide a remedy to an individual who *becomes* a debtor. This argument finds support in *Tinker v. Sturgeon State Bank*, 99 B.R. 957 (Bankr. W.D.Mo.1989). That decision permitted an individual to bring a Section 525(b) claim even though she was fired from her job five days prior to filing for protection under the Bankruptcy Code.

In allowing the claim, the *Tinker* Court reviewed and quoted legislative history in deriving its interpretation of § 525(b):

> "Under this section, no private employer may terminate employment of or discriminate with respect to employment against any person on the basis that person had been or will be a debtor in bankruptcy, or has suffered insolvency pending a discharge." (S.Rep. No. 98-65, 98th Long. [sic] 1st Sess. 80 (1983)).

99 B.R. at 960.

Based upon this report and the language in § 525(b)(2) which refers to "insolvency before the commencement of a case," the Court concluded that "it is not

just the filing of a petition for relief that triggers the protection of 11 U.S.C. § 525(b)." Id.

Tinker's result may be fair under the facts of that case but this Court disagrees with its legal analysis. First, since the language of the statute is clear, it is not appropriate to consider legislative history. *See e.g., In re Burns,* 887 F.2d at 1545. Second, *Tinker* erroneously resorts to questionable legislative history in order to vary the unambiguous language of § 525(b). The legislative history relied upon in *Tinker* is not a report that accompanied the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), which Act included Section 525(b). Rather, *Tinker* relies upon a Senate report to the unenacted Omnibus Bankruptcy Improvements Act of 1983, which was but one of several stillborn bills that preceded the July 10, 1984 enactment of BAFJA by both houses of Congress. Thus, even if the Court considered legislative history, the indirect legislative history cited in *Tinker* is not a conclusive expression of congressional intent sufficient to overcome the clear command of the statute itself. *In re Burns,* 887 F.2d at 1551-1552.

The *Tinker* decision is also factually distinguishable from the instant case. *Tinker's* rationale is premised upon safeguarding against a race between an employer and a prospective debtor in which the employer seeks to fire the employee before the employee can file for protection under the Bankruptcy Code. The court in *Tinker* found this protection necessary where the debtor was fired just five days prior to the filing of a bankruptcy petition. The

instant case does not present the "race" scenario troubling to the *Tinker* Court. Here, Kanouse waited 209 days after his resignation before he filed his Chapter 11 petition. Thus, to the extent that strong equitable considerations affected the *Tinker* decision, those considerations do not exist in this case.

CONCLUSION

The undisputed facts establish that Kanouse was not a debtor or former debtor at the time of the alleged acts of discrimination by Gunster. As a matter of law § 525(b) affords no remedy. Having so determined, the Court declines to reach the other grounds asserted by Gunster in its summary judgment motion.

In light of the foregoing, it is hereby ORDERED and ADJUDGED as follows:

1. Defendant Gunster's motion for summary judgment is granted.

2. By separate order, final judgment will be entered in favor of Defendant, Gunster, and against Plaintiff, Kanouse.

DONE AND ORDERED.

Supreme Court, U.S.
FILED
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CLERK

No. 95-141

In The

Supreme Court of the United States

October Term, 1995

KEITH J. KANOUSE, SR.,

Petitioner,

vs.

GUNSTER, YOAKLEY & STEWART, P.A., A FLORIDA PROFESSIONAL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JACK J. AIELLO
Counsel of Record
GUNSTER, YOAKLEY,
VALDES-FAULI & STEWART, P.A.
Attorneys for Respondent
777 South Flagler Drive
Suite 500 - East Tower
P.O. Box 4587
West Palm Beach, FL 33402-4587
(407) 650-0716

7446
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED FOR REVIEW

Whether Section 525(b) of the Bankruptcy Code, by its plain meaning affords protection against employment discrimination only to an individual "who is or has been a debtor" and does not afford protection to an individual, such as Kanouse, who is not a debtor nor ever has been a debtor, at the time of the occurrence of the alleged acts of employment discrimination.

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STATEMENT OF THE FACTS

Consistent with its practice below, Gunster has consciously sought in every instance to avoid needless factual disputes in an effort to streamline the resolution of the legal issues presented in this appeal. For the limited purposes of this proceeding, Gunster, therefore, does not dispute Kanouse's statements with respect to the factual events occurring prior to the termination of his employment, that it would otherwise controvert. However, Gunster does not concede the accuracy of the legal conclusions that Kanouse derives from his factual narrative.

The Eleventh Circuit's Opinion presents a straightforward ruling on a matter of statutory construction. The facts relevant to that legal determination are few and may be succinctly stated as follows.

1. From September 15, 1983 through November 1, 1990, Kanouse was a shareholder, officer, director and employee of Gunster.

2. Kanouse asserts that in 1990, Gunster threatened him with relation to his insolvency and contemplation of commencing a bankruptcy case, including alleged threats by various firm members to cause him to be immediately expelled from Gunster if he filed for bankruptcy.

3. By a two-page letter, dated November 2, 1990, Kanouse notified Gunster of his decision to resign effective immediately in order to practice with his own firm, Keith Kanouse, P.A., with newly opened offices in Boca Raton staffed by two Gunster employees, who were leaving with him. Kanouse alleges that this departure was actually a constructive termination by Gunster.

4. On May 31, 1991 (209 days after his November 2, 1990

resignation), Kanouse filed a petition for reorganization under Chapter 11.

SUMMARY OF ARGUMENT

Section 525(b) provides a remedy to *"an individual who is or has been a debtor* under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt . . ." 11 U.S.C. § 525(b) (emphasis added). Section 525(b) bars employment termination or discrimination by a private employer against a debtor or former debtor solely because such debtor: (1) is or has been a debtor under the Bankruptcy Code; (2) has been insolvent before the commencement of a case under the Bankruptcy Code; or (3) has failed to pay a dischargeable or discharged debt. The term "debtor" when used in the Bankruptcy Code is specifically defined in Section 101(13) to mean a "person or municipality concerning which a case under this title *has been commenced."* 11 U.S.C. § 101 (13) (emphasis added).

The question for determination on appeal is whether Kanouse may seek relief under Section 525(b) for alleged acts of employment discrimination which occurred seven months before Kanouse became a "debtor" within the contemplation of the Bankruptcy Code. Given the unambiguous language of Section 525(b) and the Supreme Court's mandate to derive meaning wherever possible solely from the language of the Bankruptcy Code, the answer is plain: Section 525(b) affords no remedy to Kanouse because Kanouse was neither a debtor nor a former debtor at the time of the occurrence of the alleged acts of employment discrimination by Gunster.

REASONS FOR DENYING THE WRIT

I.

SECTION 525(b) OF THE BANKRUPTCY CODE AFFORDS NO REMEDY TO KANOUSE BECAUSE KANOUSE WAS NOT A DEBTOR AT THE TIME OF THE OCCURRENCE OF THE ALLEGED ACTS OF DISCRIMINATION.

A. Section 525(b) Of The Bankruptcy Code

Section 525(b) of the Bankruptcy Code states in pertinent part as follows:

> No private employer may terminate the employment of, or discriminate with respect to employment against, *an individual who is or has been a debtor* under this title . . . *solely because such debtor or bankrupt* —
>
> (1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;
>
> (2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or
>
> (3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act. (emphasis added).

Thus, Section 525(b) prohibits an employer from discriminating against or terminating the employment of a debtor or former debtor solely because such debtor: (1) is or has been a debtor under the Bankruptcy Code; (2) has been insolvent; or (3) has not paid a dischargeable debt.

B. Kanouse Did Not Become A "Debtor" Under The Bankruptcy Code Until May 31, 1991 When He Filed His Bankruptcy Petition.

For the purpose of the Bankruptcy Code, the term "debtor" is defined in Section 101(13) to mean a "person or municipality concerning which a case under this title *has been commenced*." 11 U.S.C. § 101(13) (emphasis added). To commence a case under the Bankruptcy Code, a person must file a "petition." A petition is defined in Section 101(42) of the Bankruptcy Code as serving the purpose of "*commencing* a case under this title." 11 U.S.C. § 101(42) (emphasis added). Thus, a person such as Kanouse is not invested with the status of a "debtor" under the Bankruptcy Code until a bankruptcy case is commenced through the filing of a petition. Accordingly, Kanouse was not a "debtor" within the contemplation of the Bankruptcy Code on November 2, 1990, the day he resigned from Gunster, and did not become a debtor until some seven months later on May 31, 1991 when he filed a petition for Chapter 11 relief.

C. The Plain Meaning Of Section 525(b) Prohibits Employment Discrimination Only Against An Individual Who Is Or Has Been A Debtor.

By this action, Kanouse seeks to impose liability upon Gunster under Section 525(b) of the Bankruptcy Code for acts of alleged bankruptcy discrimination that ended 209 days before Kanouse became a "debtor" under the terms of the Code. Kanouse's legal theory has no basis in the Code. Section 525(b),

by its plain language, affords no remedy to an individual in Kanouse's circumstance, who was neither a debtor nor former debtor at the time of the occurrence of the alleged acts of wrongdoing.

As explained in the scholarly memorandum opinion of Bankruptcy Judge Mark, which was approved, affirmed, and adopted by the District Court and affirmed by the Eleventh Circuit, this Court requires the Bankruptcy Code to be construed, wherever possible, in accordance with its plain meaning. (App. A, B and C, as attached to Kanouse's Petition for Writ of Certiorari).[1] In the leading case of *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 1031, 103 L. Ed. 2d 290 (1989), the Court enunciated the rule that the Bankruptcy Code must be interpreted in accordance with the meaning of its plain language, except in the rare cases in which the literal application of the statute would present a result demonstrably at odds with the intentions of its drafters. The Supreme Court's rationale for requiring strict construction of the Bankruptcy Code was the recognition that the Bankruptcy Code introduced a sweeping overhaul to a substantial part of the system. Thus, the Court held, "(I)t is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as a statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." 489 U.S. at 240, 109 S. Ct. at 1030.

In the aftermath of *Ron Pair*, the courts, including this Court, have repeatedly given effect to a plain language interpretation of the Bankruptcy Code. *E.g., Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 2248, 119 L. Ed. 2d 519 (1992) (Section

1. For ease of use, throughout this brief, Respondent Gunster will utilize and refer to the Appendix attached to Kanouse's Petition, as appropriate, as App. A, B and C.

541(c)(2)) (when there is clarity of the statutory text, the party urging an interpretation contrary to the plain meaning of the statute bears an exceptionally heavy burden of persuasion); *Union Bank v. Wolas*, 502 U.S. 151, 112 S. Ct. 527, 116 L. Ed. 2d 514 (1991) (Section 547(c)(2)) (the fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning); *Toibb v. Radloff*, 501 U.S. 157, 111 S. Ct. 2197, 115 L. Ed. 2d 145 (1991) (Section 109); *In re Burns*, 887 F.2d 1541 (11th Cir. 1989) (Section 523(a)(7)); *In re Ferguson*, 134 B.R. 689 (Bankr. S.D. Fla. 1991) (Section 1322(a)(2)); *In re Suarez*, 127 B.R. 73 (Bankr. S.D. Fla. 1991) (Section 522(b)).

In *Burns*, the Eleventh Circuit construed Section 523(a)(7) of the Bankruptcy Code in accordance with its plain meaning. Citing *Ron Pair*, the Court stated that the Bankruptcy Code's origins counsel in favor of emphasizing a plain meaning interpretation of its provisions, and declined to vary the plain statutory language by resorting to conflicting legislative history. *Id.* at 1545. The court in *Burns* resolved "the question of how to read the legislative history in a simple fashion: by reading the statute and taking it at face value." *Id.* at 1551. *Burns* requires a court to first look to the statutory language of the section of the Bankruptcy Code being construed and, if that language is plain, the court must enforce it according to its terms without looking beyond the statute to its legislative history. *Id.* at 1544. This is exactly the analytical approach to the Bankruptcy Code recently utilized and approved by this Court in the case of *Toibb v. Radloff*, 501 U.S. at 162, 111 S. Ct. at 2200.

Moreover, resort to legislative history where, as in the instant case, the language of the statute is unambiguous, is contrary to the canons of statutory construction. *See, e.g., Toibb v. Radloff*, 501 U.S. at 162, 111 S. Ct. at 2200; *In re Burns*, 887 F.2d at 1544. As this Court held in *West Virginia University Hospitals*,

Inc. v. Casey, 499 U.S. 83, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991), unambiguous statutory language cannot be varied by resort to conflicting legislative history:

> The best evidence of congressional purpose is the statutory text adopted by both houses of Congress and submitted to the President. Where the statute contains a phrase that is unambiguous — that has a clearly accepted meaning in both legislative and judicial practice — we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process. Where as here the statute's language is plain, the sole function of the court is to enforce it according to its terms.

499 U.S. at 84, 111 S. Ct. at 1139.

Similarly, "in construing 525(b), most courts have applied the plain meaning of the statute." *Laracuente v. Chase Manhattan Bank*, 891 F.2d 17, 21 (1st Cir. 1989) (*citing* collected cases); *See also, In re Exquisito Services, Inc.*, 823 F.2d 151, 153 (5th Cir. 1987) (when analyzing § 525 the focus should be on the section's specific language). In *In re Madison Madison Intern. of Illinois, P.C.*, 77 B.R. 678, 680 (Bankr. E.D. Wis. 1987), for example, the court held that "[b]ecause § 525(b) is unambiguous, no resort to its legislative history is necessary." (*citing* collected cases).

In the instant case, both Judge Mark and Judge Aronovitz found, and the Eleventh Circuit agreed, that the language of Section 525(b) is plain and unambiguous on its face and concluded that the statutory safeguards against employment discrimination extend only to an "individual who is or has been a

debtor." (App. A, B and C). Accordingly, the lower courts found that since Kanouse was not a debtor nor had been a debtor at the time of the alleged acts of discrimination, he is not entitled to relief under 525(b). (App. A, B and C).

D. The Legal Analysis Of Section 525(b) In The Tinker Case Is Unpersuasive.

In order to escape a plain language interpretation of Section 525(b), Kanouse relies primarily upon the holding and the analysis set forth in the case of *In re Tinker*, 99 B.R. 957 (Bankr. W.D. Mo. 1989). Each of the courts below found the legal analysis in *Tinker* to be unpersuasive. (App. A, B and C).

1. *The Facts Of In Re Tinker*

In *Tinker*, a bank terminated an employee, who was also a borrower of the bank. The bank fired the employee when it discovered that the employee secretly had sold certain secured collateral and turned the proceeds over to her bankruptcy counsel. Five days after her discharge, the employee filed for bankruptcy. The bankruptcy court refused to construe strictly the language of Section 525(b) to exclude the plaintiff from recovery solely because she was not a debtor at the time of her termination. *Id.* at 959. The court expressed two reasons for its refusal to enforce the plain language of the statute. First, the court expressed its belief that a strict interpretation of the statute would frustrate the intent of Congress by setting up a foot race between the prospective debtor and his or her employer. The court discerned this legislative intent by quoting from a Senate report accompanying S.445, the unenacted Omnibus Bankruptcy Act of 1983, which the court characterized as "a forerunner to the Bankr. Amend. of 1984." *Id.* Second, the *Tinker* court found it significant that Section 525(b)(2) prohibited discrimination against a debtor solely because such debtor has been insolvent before the

commencement of a case. The court, without explanation, concluded that the quoted language constituted "substantial proof that it is not just the filing of a petition for relief that triggers the protection of 11 U.S.C. § 525(b)." *Id.* The bankruptcy court nonetheless entered judgment in favor of the bank, and in doing so prevented its liberal reading of Section 525(b) from being challenged, reasoning that the prospective bankruptcy, although a factor, was not the sole factor in the bank's termination decision.

2. The Eleventh Circuit And The District Court Correctly Affirmed The Bankruptcy Court's Decision That The Tinker Dicta Should Not Be Followed.

In the instant case, the lower courts rejected the legal analysis set forth in *Tinker* — and for good reason. (App. A, B and C). *Tinker's* rejection of the plain meaning doctrine flies in the face of the settled decisions of higher courts, including the aforementioned decisions of this Court. It is also contrary to the plain language analysis employed by the First Circuit, the only Court of Appeals that has had occasion to directly construe Section 525(b), as well as those courts that have found Section 525(b) to be clear on its face. *Laracuente,* 891 F.2d 17 (holding that Section 525(b) should be narrowly construed in accordance with its plain meaning and rejecting policy arguments in favor of a liberal construction); *see* cases discussed above at 7.

Kanouse argues that the holding in *Tinker* is consistent with an exception to the plain meaning doctrine recognized by the Supreme Court in *Ron Pair.* (Pet. Br. at 14). As a review of the Court's decision in *Ron Pair* makes clear, Kanouse exercises considerable editorial license in characterizing that exception. What the Supreme Court actually stated in *Ron Pair* in dictum was that: "The plain meaning of legislation should be conclusive, except in the rare cases (in which) the literal application of a

statute will produce a result demonstrably at odds with the intention of its drafters . . ." 489 U.S. at 242, 109 S. Ct. at 1031. As this Court held in *Ron Pair*, a proponent of this exception must meet an "exceptionally heavy" burden to establish that Congress intended a result at odds with the plain meaning of the Bankruptcy Code. *Patterson v. Shumate*, 112 S. Ct. at 2248. Kanouse utterly fails to meet this burden.

The legislative history relied upon by Kanouse is the same sparse, indirect legislative history cited in *Tinker*. It consists of a single Senate Report to the *unenacted* Omnibus Bankruptcy Improvement Act of 1983, which was but one of several stillborn bills that preceded the July 10, 1984 enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 ("BAFJA") by both houses of Congress. When viewed in the light of day, this meager legislative history referenced in *Tinker* and relied upon by Kanouse is no legislative history at all.

The Eleventh Circuit in *Burns* refused to be swayed from a plain language interpretation of the Bankruptcy Code by far more compelling, direct legislative history, noting in a footnote that "even a conference report cannot overrule the clear direction of the statute itself." 887 F.2d at 1548 n. 7. The Bankruptcy Court's determination, quoted with approval by the District Court (App. B and C), was eminently correct that the indirect legislative history relied upon by Kanouse is far too inconclusive an expression of congressional intent to overcome the clear command of the statute itself. (App. B and C); *see In re Burns*, 887 F.2d at 1551-52. Kanouse's invitation to rewrite the statute violates not only the plain meaning of Section 525(b), but also undermines the intent and prerogative of Congress in enacting Section 525(b).

In *In Re Madison Madison Intern. of Illinois, P.C.*, 77 B.R. at 681, the Bankruptcy Court for the Eastern District of Wisconsin

declined a similar invitation to rewrite Section 525(b) and correctly stated:

> [a]ny attempt to liberalize this statute, in the face of its plain meaning is inappropriate. Had Congress intended an expansive interpretation to § 525(b), it could have so stated. Where Congress wants to permit an action, it is capable of making that intention clear . . . We cannot find a cause of action under § 525 when Congress has expressly declined to provide one. This is not a case where following the clear language of the statute will lead to an absurd result. Courts must not engage in judicial legislation. They are not empowered to tinker with Congress's statutory schemes, even if they believe they can improve upon them.

In re Madison Madison Intern. of Illinois, P.C., 77 B.R. at 681, (internal citations omitted).

In addition, nothing in the direct legislative history of BAFJA, which Act included Section 525(b), suggests, much less establishes, that a literal interpretation of Section 525(b) stands at odds with the intention of its drafters. BAFJA contains *no* relevant commentary relating to Section 525(b). On Page 15 of his brief, Kanouse acknowledges as much and admits that "there is no legislative history accompanying the 1984 amendment." (Pet. Br. at 15).

Finally, Kanouse, in line with *Tinker,* also argues that the language of Section 525(b)(2) suggests that "an insolvent individual who has not yet filed for bankruptcy protection when terminated may still fall within the protection of the statute once

he does file." (Pet. Br. at 11). This argument is premised on an obvious misreading of the statute. Section 525(b)(2) prohibits a private employer from terminating the employment of, or discriminating with respect to, employment "against an individual who is or has been a debtor . . . solely because such debtor . . . (2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge . . ." 11 U.S.C. § 525(b)(2).

In spite of Section 525(b)(2)'s clear language, Kanouse requests the Court to disregard the identity of the class of persons entitled to statutory protection (*i.e.*, present and past debtors) and to expand the protections of the Bankruptcy Code to include insolvent employees, who eventually become debtors (*i.e.*, future debtors). Under this unworkable scenario suggested by Kanouse, employers are left to guess at their peril whether a given employee will file for bankruptcy at some time in the indefinite future. This twisted interpretation is not only unworkable, it runs contrary to the plain language of the statute. Section 525(b)(2) prohibits an employer from discriminating against a *debtor* on the basis that the *debtor* has been insolvent before the commencement of a bankruptcy case or during the case. It decidedly does not afford relief to a *non-debtor* on the basis that the *non-debtor* has been insolvent before the commencement of a bankruptcy case. Thus, Kanouse cannot satisfy the "exceptionally heavy" burden of demonstrating that the instant case is one in which a literal application of Section 525(b) would be demonstrably at odds with the intention of its drafters.

E. Kanouse's Interpretation Of § 525(b) Raises Serious Constitutional Questions In Violation Of The Canons Of Statutory Construction.

The reading of Section 525(b) urged by Kanouse not only conflicts with the plain meaning of the statute, but also conflicts

with the rule against construing a federal statute in a manner that raises serious constitutional problems. *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 604 (11th Cir.), *cert. denied*, 113 S. Ct. 182, 121 L. Ed. 2d 127 (1992); *Frisby v. Schultz*, 487 U.S. 474, 483, 108 S. Ct. 2495, 2501, 101 L. Ed. 2d 420 (1988). According to Kanouse, a lawful discharge can be rendered unlawful after the fact if the employee elects in the future to file for bankruptcy. If Section 525(b) is construed as Kanouse suggests so as to prohibit a private employer from discriminating against an "individual who is, has been or *will be* a debtor," then the statute is arguably violative of due process and void for vagueness. No statute, no matter the standard of review, that prohibits discrimination against an unknown class of persons whose identity depends upon the occurrence of an uncertain future event can meet constitutional muster. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S. Ct. 1186, 1193, 71 L. Ed. 2d 362 (1982) (setting forth standard for constitutional sufficiency of laws regulating economic activity). This would be similar to a federal statute prohibiting discrimination against any "individual who *will be* a homeowner." Such a law presents the same evil that led to the constitutional prohibition against *ex post facto* laws. Simply put, no action that is lawful at the time of its performance should be rendered unlawful after-the-fact. Yet, that is the interpretation of Section 525(b) urged by Kanouse.

F. The *Tinker* Case Is Factually Distinguishable From The Instant Case.

Each of the lower courts also found the *Tinker* decision to be factually distinguishable from the instant case. (App. A, B and C). Judge Mark noted that the rationale of the *Tinker* case is premised upon safeguarding against a race between an employer and a prospective debtor in which the employer seeks to fire the employee before the employee can file for protection under the

Bankruptcy Code. (R1-2, Exh. 14-6). Judge Mark determined that:

> The instant case does not present the "race" scenario troubling to the *Tinker* court. Here, Kanouse waited 209 days after his resignation before he filed his Chapter 11 petition. Thus, to the extent that strong equitable considerations affected the *Tinker* decision, those considerations do not exist in this case.

Id. Judge Aronovitz and the Eleventh Circuit agreed with Judge Mark's reasoning finding that no race scenario existed. (App. B and C).

In *Tinker,* the employee was abruptly fired by the employer. Here, in breach of the 30 day notice requirement of his employment agreement, Kanouse abruptly resigned from Gunster in order to practice with his own firm, Keith Kanouse, P.A., with newly opened offices in Boca Raton, Florida. Unlike the fired employee in *Tinker,* Kanouse was not suddenly discharged by Gunster. Kanouse suddenly resigned from Gunster.

Judge Mark was eminently correct in his determination that the instant case does not present a "race" scenario. As Judge Mark noted, "Kanouse waited 209 days after his resignation before he filed his Chapter 11 petition." (App. C). Kanouse's 209 day delay between the filing of his bankruptcy petition and his job resignation is more than 40 times greater than the 5 day interval in *Tinker.*

At no time was Kanouse at risk of being terminated by Gunster before he could succeed in filing a petition for relief. The

contrary was true. By his own admission, Kanouse first had to file for bankruptcy in order to trigger the Management Committee's alleged threat to call a Board of Directors meeting to seek his expulsion. (Pet. Br. at 6). Moreover, under the terms of his employment agreement, a majority vote of Gunster's entire Board of Directors, consisting of all of its partners, was required to terminate Kanouse's employment, which termination was not effective until 30 days from and after the vote. Thus, the element of a competitive foot race to the courthouse that the *Tinker* court found so persuasive is entirely lacking.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioner's request for writ of Certiorari should be denied.

Respectfully submitted,

JACK J. AIELLO
Counsel of Record
GUNSTER, YOAKLEY, VALDES-FAULI
& STEWART, P.A.
Attorneys for Respondent
777 S. Flagler Drive, #500 East
P.O. Box 4587
West Palm Beach, Florida 33402-4587
(407) 650-0716